GONZALEZ SAGGIO HARLAN

THE GSH 60 SECOND MEMO®

SPONSORED BY THE GSH EMPLOYMENT GROUP

November 12, 2014

Warren E. Buliox, Esq.

Questions on this topic? **CLICK HERE**

# To Judge or Not to Judge

## Tattoos and Body Art in the Workplace

**By Warren E. Buliox**

They say you cannot judge a book by its cover. But can you sometimes? Suppose you have an employee who one day decides to get a tattoo, a visible body piercing, or other body art you simply do not like or do not otherwise believe is consistent with the company's public image. With or without a dress code policy governing your employees' appearance at work, and perhaps even having a policy specifically governing tattoos, body piercing, and the like, can you make a judgment call here? Can you require the employee to cover it up and, if he/she does not, can you take action against that person's employment? What if the body art has some type of religious or cultural significance? What if, however, it is racially, sexually, or otherwise offensive but, at the same time, is mandated by some purported religious or cultural tenet?

As a general rule, and in non-contractual employment relationships, an employer can take action against an employee for any reason or no reason at all, so long as the reason -- if any -- is not connected to some protected characteristic, such as race, national origin, sex, religion, etc. While this is helpful as a baseline for understanding when action can be taken, some court decisions from around the country provide more insight and guidance.

First, in a state of Washington federal court case, a restaurant worker was fired after refusing to cover up a tattoo, which he alleged was obtained for religious reasons. The tattoo, wrapped around his wrist and written in Coptic, provided: "My Father Ra is Lord. I am the son who exists of his Father; I am the Father who exists of his son." The employer, pursuant to policy, asked the

employee to cover it. The employee explained the tattoo's significance and asserted that covering it up purposefully would be a sin. He was subsequently discharged for his refusal, and a lawsuit for religious discrimination ensued.

The employer argued that the alleged religious practice was not a sincerely held, bona-fide religious practice, but instead a personal preference that was applied inconsistently and arbitrarily, in that the employee claimed that inadvertent covering was acceptable, but that intentional covering was not. The district court, however, refused to grant summary judgment in favor of the employer on this issue. Given the employee's detailed deposition testimony regarding the practice and the fact that he knowingly sacrificed his job rather than cover his tattoo, the court refused to find in favor of the employer on summary judgment, and the matter thereafter settled.

The employer also argued that accommodating the employee by allowing him to display his tattoos constituted an undue hardship. In the context of a religious discrimination claim under Title VII, an accommodation constitutes an undue burden if it were to impose more than a *deminimis* cost on the employer. This may include both economic costs (such as loss of business) and, depending on jurisdiction, non-economic cost (such as harm to public image). In either case, the standard is less demanding than the undue hardship standard in Americans with Disability Act claims.

In arguing that allowing the employee to display his tattoo was an undue hardship, the employer cited a First Circuit case (covering Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island), which held that possible harm to public image, even without an actual customer complaint, can create an undue hardship. The court noted that it was bound by Ninth Circuit precedent (covering Alaska, Arizona, California, Guam, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington) and not the First Circuit, and took into consideration the lack of evidence about any customer complaints. Given that, along with the tattoo being small in size, the court held that the employer had not established the existence of an undue hardship.

Meanwhile, an Indiana district court case involved some of the same issues against a very different factual backdrop. In that case, an employee with a tattoo depicting a hooded figure standing in front of a burning cross stated that he was a member of the Church of the American Knights of the Ku Klux Klan and that a fiery cross was one of the church's seven sacred symbols. After being asked to cover the tattoo because others, including African-American employees, found it offensive and threatening, he complained that African-Americans had tattoos he found offensive and that he was being discriminated against on account of his religious practices. Applying Seventh Circuit precedent (which covers Illinois, Indiana,

and Wisconsin), the court granted summary judgment in favor of the employer, and the court noted that the employee did not state a cognizable claim of religious discrimination because he did not present evidence that covering his tattoo conflicted with his religious beliefs. Further, and as an independent reason -- the employee did not *inform* his employer that covering the tattoo conflicted with his religious beliefs. The court further held that the employer reasonably accommodated the asserted religious practice by allowing him to work with the tattoo covered. As the court noted, "[the employer] accommodated [the employee's] tattoo depiction of his religious belief that many would view as a racist and violent symbol by allowing him to work with the tattoo covered; Title VII doesn't require more." Any further accommodation, the court noted, would create an undue hardship for the employer inasmuch as the tattoo can be viewed as a symbol of hatred, violence, and racial supremacy and would otherwise violate the company's racial harassment policy (i.e., create harassment/hostile work environment issues).

From all of this, we get a few takeaways. As an employer, and under limited circumstances, you can certainly judge a book by its cover when it comes to body art and take employment action against individuals in connection with the same. In some circumstances, you may even want to take action, as would be the case if the body art arguably creates a hostile work environment for other employees. While it is good, and recommended, to have a dress code policy in place that specifically addresses body art, be mindful of possible religious and other protections, and allow for exemptions to the policy when appropriate. Each case should be examined on an individual basis and, in unique or difficult situations, discussed with an experienced employment lawyer who is familiar with the law in your jurisdiction.